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No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

vs.

THE STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The State of New York, by its Attorney General, Robert Abrams, submits this brief *amicus curiae* pursuant to Supreme Court Rule 36.4 in support of Samuel Bice Johnson's request for resentencing. As chief legal officer of the State under New York Executive Law § 63, (McKinney 1982) the Attorney General urges this Court to adopt the interpretation of the full faith and credit clause set forth in *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985), which requires each state to recognize other states' vacaturs and other

limitations on their criminal judgments. Accordingly, Mississippi is precluded from basing a death penalty on a New York conviction which has been vacated by the New York Court of Appeals.

Because the consequences of Mississippi's refusal to recognize the validity of the New York court's vacatur are so grave and because the reasons for the refusal call into question the integrity of the New York court proceedings, the Attorney General submits this brief in order to clarify the record before this Court.

Statement of the Case

In 1963, Samuel Bice Johnson, then a resident of Monroe County, New York, was convicted of assault in the second degree. He was sentenced to a prison term of 1 1/2-3 years and served one year before being paroled. Johnson was not advised at sentencing by either his lawyer or the court of his right to appeal, a failure which under New York law entitles a defendant to resentencing so he may appeal. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).[1]

When he discovered that he had the right to appeal, Johnson repeatedly petitioned for permission to do so, but his attempts were thwarted several times. *People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325. In 1967, he filed a *pro se* notice of appeal. (A. 1).[2] This notice was dismissed by a court clerk in Monroe County who deemed the notice "untimely," not knowing that Johnson had not initially been advised of his right to appeal. (A. 2).

Between 1967 and 1971, Johnson filed two *pro se* petitions alleging a denial of his right to appeal. These applications were denied, and Johnson filed a notice of appeal from one of these

[1] The New York Court of Appeals has applied *Montgomery* retroactively. *People v. Lucci*, 27 N.Y.2d 550, 261 N.E.2d 263, 313 N.Y.S.2d 121 (1970).

[2] "A." references are to documents appended to New York's brief in support of Mr. Johnson's petition for certiorari.

denials. (A. 3-10). The Monroe County public defender's office was appointed to represent Johnson on the appeal, but that office never perfected the appeal, a failure which it later admitted. (A. 11).

In 1982, in Mississippi, Johnson was convicted of capital murder and sentenced to death. The jury found three aggravating circumstances justifying imposition of the death penalty, but the one relied on most heavily by the prosecution was Johnson's 1963 assault conviction in New York.[3] Thus, as it stood in 1982, Johnson's 1963 conviction was the unappealed judgment of a trial court.[4]

After Johnson's conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court, *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), he petitioned this Court for a writ of certiorari which was denied. *Johnson v. Mississippi*, 106 S. Ct. 2930 (1986).

On August 4, 1986, Johnson filed a motion for post-conviction relief in the Mississippi Supreme Court. On the same day, the Mississippi Supreme Court granted a stay of execution. Simultaneously, Johnson again attacked his New York conviction in the New York courts.

On March 24, 1987, in a per curiam opinion, the New York Court of Appeals vacated Johnson's 1963 conviction and dismissed the underlying indictment, holding that he had been denied his constitutional right to appeal:

[3] The Mississippi Supreme Court said that the admission of the assault conviction as an aggravating circumstance could not be considered harmless error since it was heavily relied upon by the prosecutor in seeking the death penalty. *Johnson v. State*, 511 So. 2d 1333, 1338 (Miss. 1987).

[4] Article 460 of the New York Criminal Procedure Law (McKinney 1983) governs the taking and perfecting of appeals. In an appeal as of right, Johnson would have had to file a notice of appeal within 30 days of the imposition of his sentence. N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 1983). N.Y. Crim. Proc. Law § 460.30 (McKinney 1983) provides for extensions of time for taking an appeal. As of 1986, however, Johnson's notice of appeal had not been filed.

> It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled.

People v. Johnson, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987).

Additionally, New York's highest court concluded that the interests of justice would not be served by a new trial since "the records of defendant's trial have been lost, . . . neither reconstruction nor a new trial is possible and . . . defendant has raised appealable issues with possible merit." 69 N.Y.2d at 342, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

On March 26, 1987, Johnson transmitted a certified copy of the New York Court of Appeals' decision vacating his 1963 conviction and dismissing the indictment to the Mississippi Supreme Court. In so doing, Johnson was following Mississippi law. To determine if a prior conviction in another state is constitutionally valid, Mississippi law requires a defendant to challenge the conviction in the other state:

> [A]ny such proceeding should be brought in the foreign state in which such conviction occurred, pursuant to the state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis.

Phillips v. State, 421 So. 2d 476, 481-82 (Miss. 1982).

On May 27, 1987, a divided Mississippi Supreme Court held that despite New York's vacatur of the 1963 conviction, Johnson was not entitled to resentencing. *Johnson v. State*, 511 So. 2d

1333 (1987). The court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." *Id.* at 1338. Further, the Mississippi court found that the New York proceedings were not "adversarial" because the State's attorney had "no significant interest or concern in vouchsafing the validity of his [Johnson's] 1963 conviction." *Id.*

In a dissenting opinion joined by two judges, Justice Robertson criticized the majority for "tak[ing] a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987 order should be given less than full faith and credit." *Id.* at 1343. The dissenting opinion concluded that "vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial." *Id.* at 1345.

The Mississippi Supreme Court denied petitioner's request for rehearing on July 15, 1987. *Johnson v. State*, 511 So. 2d 1333 (Miss. 1987). This Court granted certiorari on January 11, 1988.

Summary of Argument

Full faith and credit considerations require that if a state chooses to use another state's convictions to enhance its criminal penalties, it must give equal recognition to a sister state's vacaturs. Although New York consistently follows this constitutional principle, Mississippi violates this doctrine by seeking to base a penalty of death upon a New York conviction which has been vacated by the New York Court of Appeals.

Mississippi violated the fundamental rule that one state may not question the legal principles or reasoning of the courts of another state. To avoid recognizing the vacatur of the New York conviction, Mississippi relied on such irrelevant facts as the Mississippi court's mistaken belief that the New York reversal was on collateral attack rather than on direct appeal, Mr. Johnson's having served his sentence on the 1963 conviction, and the twenty year lapse between the conviction and the reversal by the New York Court of Appeals. The Mississippi court

attacked not only the integrity of the New York proceedings but even urged that the New York prosecutor was not sufficiently adversarial.

Mississippi's reliance on an invalidated New York conviction to support a sentence of death mandates a resentencing.

ARGUMENT

THE MISSISSIPPI SUPREME COURT'S REFUSAL TO GIVE EFFECT TO THE NEW YORK COURT OF APPEALS' VACATUR OF A NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE

Article IV, § 1 of the United States Constitution declares that "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State." Mississippi's use of a New York conviction which New York courts have vacated, as a basis for the death penalty, violates this clause of the Constitution. Mississippi went behind the face of the New York judgment of vacatur in violation of the full faith and credit clause. The judgment was valid on its face and was issued by a court which had jurisdiction over the matter and the parties. "In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based . . . ." *Milliken v. Meyer*, 311 U.S. 457, 462 (1941).

By its action attacking the validity of the New York decision, Mississippi causes friction within the federal system. This Court has repeatedly underscored the importance to national unity of following the mandates of the full faith and credit clause. In *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935), Chief Justice Stone declared:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others and to make them integral parts of a single nation.

296 U.S. at 276-277. *See also Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (purpose of the clause is to "help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they had in the state of the original forum").

The constitutional provision was adopted to change the tendency of the colonies to function as separate nations. In fact, the recognition by a sovereign of the validity of another sovereign's judgment was a principle of English common law. As early as 1678, an English court gave conclusive effect to the judgment of a foreign state:

> [I]t is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one Kingdom to reverse the judgment of another? . . . And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences.

Cottington's case, 30 Car. 2 (June 10, 1678) (cited in *Kennedy v. Cassillis*, 2 Swans. 313, 326, 36 Eng. Rep. 635, 640 (1818)). But despite the English practice, before the American Revolution, most of the colonies used the judgments of other sovereignties only as evidence that such judgments existed.[5] To insure this new unity, the drafters of the Articles of Confederation included a full faith and credit provision.[6] The constitutional convention of 1787 extended that provision to include nonjudicial public acts and records and gave Congress the power

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[5] J. Sumner, *The Full Faith And Credit Clause – Its History and Purpose*, 34 Or. L. Rev. 224, 226 (1955).

[6] "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State." Articles of Confederation, art. IV.

to "prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."[7]

All of article IV concerns the relations between the States. The individual clauses – privileges and immunities, extradition,[8] and full faith and credit – provide the mechanisms for achieving the cohesion of separate states. The wisdom of these constitutional principles is illustrated by the results when states ignore them. Disregard of other states' judgments and laws by a forum state historically leads to breakdowns in the national system. One commentator suggests that the breakdown of comity among states was a contributing factor to the civil war. *See* P. Finkelman, *An Imperfect Union* 8 (1981).

Mississippi's refusal to respect other states' penal judgments, in contrast to its right to refuse to enforce a sister state's criminal laws, threatens to disrupt established national criminal practices. This Court has carefully distinguished between enforcement and recognition of another state's tax law judgments. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935). In that case, this Court held that even assuming that one state

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[7] The current version of the statute is 28 U.S.C. § 1738 (1982).

[8] The extradition clause accords full faith and credit to sister states' criminal judgments.

> The extradition clause articulated in mandatory language the concepts of comity and full faith and credit found in the immediately preceding clause of article IV. In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes without infringing on essential state authority.

Michigan v. Doran, 439 U.S. 282, 287 (1978) (Burger, C.J., Blackmun, and Marshall, J.J., concurring in the result). This Court, in an opinion by Marshall, J., reemphasized this theme of mandatory recognition for other states' penal judgments regarding extradition in *Puerto Rico v. Branstad*, 107 S. Ct. 2801, 2807 (1987) (upon proper demand by a governor of a foreign state, sister state had no discretion in ordering extradition of person criminally charged).

does not have to recover taxes levied under the statute of another, it must still give full faith and credit to judgments for such taxes. *See also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). The same principles extend to penal law judgments. *See, e.g., Smith v. Crouse*, 298 F. Supp. 1029, 1036-37 (D. Kan. 1968), *aff'd*, 413 F.2d 969 (10th Cir. 1969); *Bennett v. State*, 476 S.W.2d 281, 283 (Tex. Crim. App. 1972); *see also* Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 Kan. L. Rev. 1, 21-22 (1979). This is in contrast to the rule that sister states are not required to enforce a foreign penal judgment. *Nelson v. George*, 399 U.S. 224, 229 (1970); *Huntington v. Attrill*, 46 U.S. 657 (1882).

We believe the decision of the New York Court of Appeals in *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985), is the most thorough analysis of a state's obligation under the full faith and credit clause to recognize other states' restrictions on their criminal judgments. In *Farmland*, a New Jersey corporation had been convicted of price rigging in New Jersey while an application to extend its license was pending in New York. The New Jersey judgment of conviction contained the limitation that the guilty plea could not be used as evidence in any civil proceeding. In the subsequent New York hearing on whether Farmland's extension application for its New York license should be denied, a certified copy of the New Jersey conviction was received in evidence. The agency denied an extension of the New York license. The New York Court of Appeals, relying on settled principles of full faith and credit, held that the New Jersey judgment could be given no more effect in New York than it had in New Jersey. The Court, following federal law, declared:

> Under our Federal structure, each State has its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. The purpose of the full faith and credit clause

> was to avoid such conflicts and weld the independent States into a Nation (*Underwriters Assur. Co. v. North Carolina Life*, 445 U.S. 691, 704; *Sherrer v. Sherrer*, 334 US 343, 355; see generally, Reese and Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum L Rev 153). . . . The doctrine establishes a rule of evidence, however, which requires recognition of the foreign judgment as proof of the prior out-of-State litigation and gives it res judicata effect, thus avoiding relitigation of issues in one State which have already been decided in another (see, *Parker v. Hoefer*, 2 NY2d 612, *cert denied*, 355 US 833; *Durfee v. Duke*, 375 US 106; *Magnolia Petroleum Co. v. Hunt*, 320 US 430, 438; *Riley v. New York Trust Co.*, *supra*).

65 N.Y.2d at 55, 478 N.E.2d at 1316-17, 489 N.Y.S.2d at 715-16. In accordance with this theory, the New York courts have not only recognized and followed other states' post-conviction vacaturs[9] (*People v. Willis*, 79 A.D.2d 1036, 435 N.Y.S.2d 38 (2d Dep't 1981)), but have also followed another state's conclusion that a defendant should be treated as a youthful offender. *People v. Carpenteur*, 21 N.Y.2d 571, 236 N.E.2d 850, 289 N.Y.S.2d 615 (1968).[10] New York urges this Court to adopt the interpretation of the full faith and credit clause set forth in *Farmland Dairies*.

The full faith and credit clause precludes a state from questioning the logic or validity of a judgment rendered by a sister state. *Milliken v. Meyer*, 311 U.S. 457, 462 (1941). The Mississippi

[9] Mississippi announced that it will set aside a conviction under an habitual criminal statute if the predicate conviction is subsequently vacated by another state. *Phillips v. State*, 421 So. 2d 476 (Miss. 1982). However, Mississippi now refuses to follow this rule in the instant capital case.

[10] New York also allows a defendant to challenge the use of a prior conviction to enhance sentences on subsequent felonies. *People v. Wilkins*, 28 N.Y.2d 213, 269 N.E.2d 803, 321 N.Y.S.2d 87 (1971); N.Y. Crim. Proc. Law § 400.20 (McKinney 1983). A successful challenge either in New York or in a sister state will result in a reduced sentence in New York.

Supreme Court violated this constitutional prohibition and in doing so made serious errors about New York law. Mississippi attempts to justify its continued recognition of the 1963 conviction while ignoring the 1987 vacatur by relying on various irrelevant facts. Among the reasons cited by the Mississippi court are its mistaken belief that the New York reversal was on collateral attack rather than on direct appeal, Mr. Johnson's having served his sentence on the 1963 conviction, and the twenty year lapse between the conviction and the reversal by the New York Court of Appeals. Mississippi further violates the *Milliken* rule by attacking the integrity of the New York prosecutor for having "no significant interest or concern in vouchsafing the validity of [Mr. Johnson's] 1963 conviction." *Johnson v. State*, 511 So. 2d at 1338. None of these allegations, even if true, would justify Mississippi's refusal to follow New York's judgment vacating the 1963 conviction.

The Mississippi Supreme Court's fundamental confusion about the New York law under which the 1963 conviction was vacated is revealed when it stated:

> [I]n this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.

Johnson v. State, 511 So. 2d at 1338.

The Mississippi court failed to understand that the New York Court of Appeals acted on a direct appeal. Under New York law, the right to appeal is so important that under some circumstances, appeals will be allowed notwithstanding long lapses of time. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). Recognizing the importance of a defendant's right to appeal, the New York Legislature codified *Montgomery* in 1971. N.Y. Crim. Proc. Law § 460.30 (McKinney 1983); see also Bellacosa, Practice Commentary, McKinney's Consolidated Laws of N.Y. Crim. Proc. Law § 460.30 at 34.

Although this section includes a one-year extension of time in which to take an appeal, the Court of Appeals has held that it does not impose an absolute bar to appeals taken beyond the one year extension, especially where a defendant has made efforts to take a timely appeal. *People v. Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1986); *People v. Thomas*, 47 N.Y.2d 37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979). Thus, here, where Johnson made persistent efforts to appeal his conviction and appointed counsel and court personnel failed to assist him to perfect in a timely manner, the New York Court of Appeals' reversal of Johnson's conviction is consistent with well settled law in this state.

The New York Court of Appeals has fashioned different relief according to the facts of each case in which an appeal was not timely filed or perfected. In *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 150, 299 N.Y.S.2d 156 (1969), and *People v. Rivera*, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976), the Court of Appeals held that where a defendant's right to appeal had been dissipated by a court-appointed attorney's failure to file or prosecute an appeal or where the defendant had not been advised of his right to appeal, the defendant was entitled to resentencing *nunc pro tunc* so that the time for appeal would run anew. *Montgomery*, 24 N.Y.2d at 134, 274 N.E.2d at 133, 299 N.Y.S.2d at 161; *Rivera*, 39 N.Y.2d at 349 N.E.2d at 826-27, 384 N.Y.S.2d at 727.

Johnson's case was decided in accordance with *Montgomery* and *Rivera*. In *Rivera*, the Court of Appeals reversed a 23-year old conviction for reasons strikingly similar to those in this case. The defendant had not been advised of his right to appeal at sentencing in 1953, and was resentenced *nunc pro tunc* in 1973. However, after resentencing, he could not appeal because no record of his trial existed and the trial transcript was unavailable. The case was therefore remitted for a new trial.

Johnson made a motion pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1983)[11] to vacate his conviction in Monroe

[11] Section 440.10, entitled Motion to Vacate Judgment, states in pertinent part:
(footnote continued)

County on July 30, 1986, in accordance with the procedure set forth in *Montgomery*. His primary claim was that the conviction was invalid because he was not told of his right to appeal when he was sentenced.[12] On October 29, 1986, the Monroe County court granted the motion to the extent that it ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction. From that point the New York procedures were pursuant to direct appeal, not coram nobis. *People v. Johnson*, Index 32/36 (County Court, Monroe Ct. Oct. 29, 1986). Resentencing under these circumstances necessarily raised for review the conviction from which the appeal was taken. *See People v. Callaway*, 24 N.Y.2d 127, 247 N.E.2d 127, 299 N.Y.S.2d 154 (1969); *People v. Hairston*, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

The relief granted to Johnson by the New York Court of Appeals was the only appropriate remedy under the circumstances. In Johnson's case, as in *Rivera*, the trial transcript is unavailable, witnesses are deceased, trial counsel is unavailable, and the complainant cannot be found. However, unlike in *Rivera*, Johnson was able to raise the existence of appealable issues in his first trial – specifically whether his confession was obtained by coercion and subsequently illegally introduced as evidence.[13] The

1. *At any time* after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: . . .

   (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

Id. (emphasis supplied).

[12] Besides claiming that he had been unconstitutionally denied his right to appeal, Johnson's 1986 motion pursuant to section 440.10 included two other claims: that no hearing was held on the voluntariness of his confession, and that the alleged confession resulted from post-indictment interrogation without the presence of counsel. *People v. Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986).

[13] In *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965), the New York Court of Appeals adopted procedures for hearings on voluntariness of confessions to be received against a defendant at trial in accordance with the constitutional requirements this Court announced in *Jackson v. Denno*, 378 U.S. 368 (1964). *Huntley* is applied retroactively, but here where no hearing could be conducted in 1986, the Court of Appeals dismissed the indictment.

proper remedy in *Johnson* was vacatur and dismissal of the indictment, while in *Rivera*, where no appealable issues were demonstrated, a new trial was properly ordered.

Thus, the Mississippi Supreme Court misinterpreted New York law by deeming Johnson's 1986 attack on his New York conviction as collateral. While his petition was initially so styled, once the request for resentencing was granted, the case proceeded as a direct appeal of a criminal conviction.[14]

The Mississippi Supreme Court has recognized Johnson's 1963 conviction but not the 1986 vacatur because of a mistaken view of finality:

> If his crime was serious enough for him to have been convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction can be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals.

Johnson v. State, 511 So. 2d at 1339. As this Court has recognized, under the full faith and credit clause the judgment of another state must be given "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Here, the 1963 New York judgment

[14] Under New York law, a vacatur on a collateral attack is equivalent to one on a direct appeal. While Johnson's appeal began procedurally as a coram nobis petition, the ultimate ruling was on a direct appeal. The question, however, of what procedure was used to obtain the vacatur is a distinction without legal significance under New York law. Contrary to what the Mississippi court has suggested, a conviction which has been vacated pursuant to a petition under N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) is as much a nullity as one vacated pursuant to a direct appeal. *People v. Cooks*, 67 N.Y.2d 100, 491 N.E.2d 676, 500 N.Y.S.2d 503 (1986); *Burrell v. McMann*, 51 Misc. 2d 185 (N.Y. Sup. Ct. 1966); N.Y. Crim. Proc. Law § 440.10 (McKinney 1983). Furthermore, a collateral attack on an issue such as newly discovered evidence undermines confidence in the outcome of the trial as readily as issues raised on direct appeal based on the trial record.

was vacated and has no effect. It is well-settled that "[a] vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of law of the case." *No East-West Highway Committee, Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) (citing *DeNato v. Finch*, 436 F.2d 737, 740 (3d Cir. 1971)); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4432 at 302 (1981).

For Mississippi to base a sentence of death upon a judgment that has been set aside is contrary to the prevailing law. *See, e.g., Butler v. Eaton*, 141 U.S. 240, 244-45 (1891) ("The judgment complained of is based directly on the judgment of the supreme judicial court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed."); Fed. R. Civ. P. 60(b)(5) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."); Restatement (Second) of Judgments § 16 and comment c (1982) ("[A] party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief.").

The Mississippi Supreme Court also erred in relying on the 1963 conviction, because Johnson had been denied the right to a direct appeal of that judgment. The Court of Appeals for the Second Circuit has held that facts found at a criminal trial cannot be used against the convicted defendant in a later civil action if he has been denied the right to an appeal. *Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1608 (1987). In that case, Gelb had been convicted of arson and mail fraud, served his sentence and his conviction was affirmed on appeal. However, the appellate court expressly refused to decide whether Gelb had set the fire in question. Because Gelb was denied an adjudication on appeal, the Second

Circuit held that Gelb was not collaterally estopped from relitigating the issue whether he had set the fire. The Court stated:

> Appellate review plays a central role in assuring the accuracy of decisions. Thus, although failure to appeal does not prevent preclusion, *see New Haven Inclusion Cases*, 299 U.S. 392, 481, 90 S.Ct. 2054, 2104, 26 L.Ed.2d 691 (1970); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950); *Angel v. Bullington*, 330 L.Ed.2d 232 (1947), inability to obtain appellate review, or the lack of such review once an appeal is taken, does prevent preclusion.

798 F.2d at 44. In Johnson's case, because of the fault of the New York courts, there was an "inability to obtain appellate review" of Johnson's 1963 conviction. Thus, if denial of appellate review precludes finality for purposes of a civil law suit, it necessarily precludes finality where the conviction is the basis of a death sentence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (requiring a "greater degree of reliability when the death sentence is imposed"), *quoted in Zant v. Stephens*, 462 U.S. 862, 888 (1983).

The Mississippi Supreme Court also sought to justify its failure to recognize the New York judgment by attacking the integrity of the New York proceedings[15] as well as the conduct of the State's attorney. The Mississippi court wrote:

> [T]here is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial . . . the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge by the state's attorney of New York of Johnson's petition.

[15] As the Supreme Court of Pennsylvania has stated, "the structure of our federal system suggests that we should assume that steps taken by a sister state to protect rights are accurate and in good faith." *Commonwealth ex rel. Marshall v. Gedney*, 478 Pa. 299, 386 A.2d 942, 948 (1978).

Johnson v. State, 511 So. 2d at 1338. As this Court has recognized, even after a conviction, a prosecutor is "bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The New York prosecutor comported with these standards in conducting an independent investigation of the case and informing the courts of his findings.

The New York courts have consistently demonstrated that, under article IV, § 1 of the United States Constitution, they grant full faith and credit to other states' vacaturs of criminal convictions as well as other states' restrictions in their criminal judgments. Mississippi, however, has violated its obligation to recognize New York's vacatur of Johnson's 1963 conviction. Therefore, the matter should be remanded for a resentencing.

CONCLUSION

The sentence of death should be vacated and the matter remanded for a resentencing at which Mississippi is precluded from relying on Mr. Johnson's vacated 1963 New York conviction.

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Respectfully submitted,

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